Leong Yew Chin v Hock Hua Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–1086 OF 1997
ABDUL MALIK ISHAK J
11 MARCH 2008

Banking — Bills of exchange — Definition and characteristics of bills of exchange — Whether relationship between bank and customer contractual or trust in nature

Civil Procedure — Estoppel — Res judicata and issue estoppel — Plaintiff's claim for return of originals of dishonoured bills of exchange — Claim part of litigation in previous suit — Whether claim estopped by principle of res judicata

Civil Procedure — Limitation — Defendant raising defence of time bar against plaintiff's claim — Claim for dishonoured bills of exchange brought after six years from date cause of action accrued — Whether plaintiff's action time barred pursuant to s 6(1)(a) of the Limitation Act 1953 — Whether claim based on contract

Civil Procedure — Striking out — Abuse of process of court — Res judicata — Whether subject matter ought to have been raised in previous suits — Whether plaintiff barred from claiming any other ancillary or alternative reliefs which he could and should have claimed in previous suits

The plaintiff was the sole proprietor of the 'West Malaysia Frozen Food Company' and was engaged in the business of exporting frozen seafood. The plaintiff was a customer of the defendant ('bank') at all material times. In 1974, the plaintiff sold and shipped consignments of frozen prawns to one Mathew in England. A total of 13 bills of exchange against Mathew, in the face value of RM1,005,700.22, were drawn up by the plaintiff requiring Mathew to pay to the order of the bank as the plaintiff's bankers. The 13 bills of exchange were given to the bank by the plaintiff for collection. The bank credited the plaintiff's account with the face value of the bills and forwarded the said bills to its correspondent bank in England for collection. Mathew had subsequently failed to honour the bills of exchange. The bank accordingly debited the plaintiff's account with the amount previously credited together with some other bank charges incurred by the bank.

In 1980, the plaintiff commenced a suit against the bank for moneys had and received alleging that the bank had acted wrongfully and illegally in debiting his account. This suit was consolidated with the bank's suit for recovery of banking facilities granted to the plaintiff. The plaintiff's claim in the consolidated suit was dismissed and his appeal to the Federal Court was dismissed on 14 February 1996. Again in 1996, the plaintiff commenced an originating summons against the bank for the delivery up and return of the 13 bills of exchange. The originating summons was heard and dismissed with costs on 3 October 1996. The plaintiff then proceeded to file the present action against the bank for, inter alia, the delivery of the 13 dishonoured bills of exchange or alternatively for their equivalent face value together with interest. The bank filed an application to strike out the plaintiff's claim on the ground that it constituted an abuse of the process of the court, and the application was allowed by the senior assistant registrar. Hence, this appeal.

Held, dismissing the plaintiff's appeal with costs:

(1) It could not be denied that the plaintiff's present claim against the bank for the return of the originals of the dishonoured bills was so inextricably linked to the bank's right to debit his account after the bills were dishonoured and it was also clearly part of the subject matter of the litigation in the consolidated suit thereby giving rise to only one conclusion and it would be that the plaintiff's claim must be barred by the doctrine of res judicata (see para 42).

(2) The plaintiff having claimed for the return of the dishonoured bills of exchange in the originating summons could not do so again in the present action. The plaintiff would also be barred from claiming for any other ancillary or alternative reliefs or prayers which he could and should have claimed in the originating summons but did not. Thus, the plea of res judicata would definitely be invoked against the plaintiff (see paras 51 & 57).

(3) The facts of this instant case fell squarely in the ambit of the doctrine of issue of estoppel as applied in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. In the circumstances, there was no room for the plaintiff to aver that he could come within the narrow scope of 'special circumstances' so as to avoid the applicability of the doctrine of issue estoppel to his claim (see para 59).

(4) An action based on a dishonoured bill of exchange was an action founded on contract. Section 6(1)(a) of the Limitation Act 1953 provides that actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The plaintiff's account was debited, upon the dishonour of the bills of exchange in 1974/1975. The limitation period for any suit against Mathew on the dishonoured bills would have expired at the latest in 1981 (see paras 60–61).

(5) The relationship between the plaintiff and the bank could be described as customer and banker and, in the instant case, the bank was merely acting as the collecting agent on behalf of the plaintiff in respect of the collection of the bills of exchange in question. It is trite law that the relationship between the bank and its customer in relation to the current account and in the collection of the bills of exchange on behalf of a customer is in contract (see para 70).

(6) The bank was not and was never a trustee in relation to the dishonoured bills of exchange. The bank had never had title in the bills of exchange vested in them as held by the learned High Court judge in the consolidated suit and the bank claimed no interest in the dishonoured bills of exchange. Because of the judgment in the originating summons wherein the court held expressly that it found no evidence that the originals of the dishonoured bills of exchange were in the possession of the bank or its correspondent, the plaintiff was estopped by the doctrine of res judicata from saying that the documents were in the possession of the bank or its correspondent or that the documents were technically in the possession of the bank (see para 70(g)).

[Bahasa Malaysia summary

Plaintif adalah pemilik tunggal 'West Malaysia Frozen Food Company' dan terlibat dalam perniagaan pengeksportan makanan laut yang dibekukan. Plaintif adalah pelanggan defendan ('bank') pada setiap masa material. Pada 1974, plaintif telah menjual dan mengirimkan dengan kapal secara konsainan udang beku kepada Mathew di England. Sebanyak 13 bil pertukaran terhadap Mathew yang bernilai muka sebanyak RM1,005,700.22 telah dikeluarkan oleh plaintif, yang memerlukan Mathew membayar kepada pihak bank yang mana adalah bank plaintif. Kesemua 13 bil pertukaran telah diberikan kepada bank oleh plaintif untuk kutipan. Pihak bank telah mengkreditkan akaun plaintif dengan nilai muka bil-bil tersebut dan telah menghantar bil-bil tersebut kepada wakil bank mereka di England untuk kutipan tersebut. Mathew kemudiannya telah gagal untuk melunaskan bil-bil pertukaran tersebut. Pihak bank kemudiannya telah mendebitkan akaun plaintif dengan jumlah yang telah dikreditkan sebelumnya bersama-sama

dengan bayaran lain yang telah ditanggung oleh bank. Pada tahun 1980, plaintif telah memulakan satu tindakan terhadap pihak bank bagi wang yang telah diterima dan diperolehi dengan mendakwa bahawa pihak bank telah bertindak secara salah dan menyalahi undang-undang dalam mendebitkan akaunnya. Tindakan ini telah digabungkan dengan tindakan pihak bank untuk mendapatkan semula kemudahan perbankan yang telah diberikan kepada plaintif. Tuntutan plaintif dalam guaman yang digabungkan telah ditolak dan rayuannya di Mahkamah Persekutuan juga telah ditolak pada 14 Februari 1996. Sekali lagi pada tahun 1996, plaintif memulakan saman pemula terhadap pihak bank untuk penyerahan dan pengembalian 13 bil pertukaran. Saman pemula telah didengar dan ditolak dengan kos pada 3 Oktober 1996. Plaintif kemudiannya telah meneruskan dengan memfailkan tindakan ini terhadap pihak bank untuk, antara lain, menyerahkan 13 bil pertukaran yang tidak laku atau secara alternatif untuk kesamaan nilai muka bersama-sama faedah. Pihak bank telah memfailkan satu permohonan untuk membatalkan tuntutan plaintif atas alasan bahawa ianya membentuk penyalahgunaan proses mahkamah, dan permohonan tersebut telah dibenarkan oleh penolong kanan pendaftar. Maka rayuan ini.

Diputuskan, menolak rayuan plaintif dengan kos:

(1) Ia tidak boleh dinafikan bahawa tuntutan plaintif terhadap pihak bank untuk pengembalian bil-bil asal yang tidak laku berkait rapat dengan hak-hak pihak bank untuk mendebit akaunnya selepas bil-bil tersebut tidak laku dan ianya juga jelas sebahagian daripada perkara yang dilitigasi di dalam guaman yang telah digabungkan, yang hanya membangkitkan satu kesimpulan dan ia adalah tuntutan plaintif yang semestinya dihalang oleh doktrin res judicata (lihat perenggan 42).

(2) Plaintif setelah menuntut pengembalian bil-bil pertukaran yang tidak laku dalam saman pemula, tidak lagi boleh berbuat demikian dalam tindakan ini. Plaintif juga dihalang daripada menuntut relief sampingan atau alternatif yang lain atau memohon yang mana beliau boleh dan sepatutnya menuntut di dalam saman pemula tetapi tidak melakukannya. Oleh itu rayuan res judicata secara jelas akan dibangkitkan terhadap plaintif (lihat perenggan 51 & 57).

(3) Fakta kes ini terangkum secara tepat di dalam lingkungan doktrin isu estopel seperti yang diaplikasikan di dalam kes *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. Dalam keadaan ini, tidak terdapat ruang untuk plaintif berhujah bahawa dia terangkum di dalam skop sempit (keadaan khusus) untuk mengelak pemakaian doktrin isu estopel terhadap tuntutannya (lihat perenggan 59).

(4) Tindakan yang berdasarkan bil pertukaran yang tidak laku adalah tindakan yang didapati dalam kontrak. Seksyen 6(1)(a) Akta Had Masa 1953 memperuntukkan bahawa tindakan-tindakan yang didapati dalam kontrak seharusnya tidak dibawa selepas tempoh luput enam tahun daripada tarikh kausa tindakan bermula. Akaun plaintif telah didebitkan apabila bil pertukaran tidak laku pada 1974/1975. Tempoh had masa bagi mana-mana guaman terhadap Mathew berkenaan bil-bil yang tidak laku seharusnya luput selewat-lewatnya pada 1981 (lihat perenggan 60–61).

(5) Hubungan di antara plaintif dan pihak bank bolehlah digambarkan sebagai pelanggan dan bank dan dalam kes ini, pihak bank hanya bertindak sebagai ejen pengutipan bagi pihak plaintif berkenaan dengan pengutipan bil pertukaran yang dipersoalkan. Adalah undang-undang nyata bahawa hubungan di antara pihak bank dan pelanggannya berkenaan dengan akaun semasa dan dalam pengutipan bil pertukaran bagi pihak pelanggan adalah di dalam kontrak (lihat perenggan 70).

(6) Pihak bank bukan dan tidak pernah menjadi pemegang amanah berkenaan dengan bil pertukaran yang tidak laku. Bank tidak sama sekali mempunyai milikan terhadap bil-bil pertukaran yang terletak hak ke atas mereka yang mana telah diputuskan oleh hakim Mahkamah Tinggi yang bijaksana dalam menggabungkan guaman dan pihak bank telah menyatakan tidak berminat dalam bil-bil pertukaran yang tidak laku. Kerana penghakiman dalam saman pemula yang mana mahkamah memutuskan bahawa ianya didapati tiada keterangan bahawa bil-bil pertukaran yang tidak laku yang asal adalah dalam milikan pihak bank atau wakilnya, plaintif diestop oleh doktrin res judicata daripada menyatakan bahawa dokumen-dokumen adalah dalam milikan pihak bank atau wakilnya atau dokumen-dokumen secara teknikalnya di dalam milikan pihak bank (lihat perenggan 70(g)).]

Notes

For a case on abuse of process of court, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6654.

For a case on defendant raising defence of time bar against plaintiff's claim, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4640.

For cases on bills of exchange generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2023–2026.

For cases on res judicata and issue estoppel, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2644–2647.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Blair v Curran (1939) 62 CLR 464 (refd)

Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502; (1988) 78 ALR 271 (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (refd)
Duchess of Kingston's case [1776] 21 Smith LC (13th Ed) 644 (refd)
Edward Thomas Foley v Thomas Hill & Ors (1848) 2 HL Cas 28 (refd)
Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (receivers and managers appointed) (in liquidation) (1993) 43 FCR 510; 115 ALR 377 (refd)
Ellison v Collingridge (1850) 9 CB 570 (refd)
Greenhalgh v Mallard [1947] 2 All ER 255 (refd)
Hoystead v Federal Commissioner of Taxation (1921) 29 CLR 537 (refd)
Jackson v Goldsmith (1950) 81 CLR 446 (refd)
Jay Cooke & Ors v Henry S Gill & Anor, The Union Bank of London, Garnishees (1873) LR 8 CP 107 (refd)
Lovell v Hill (1833) 6 C & P 238 (refd)
Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd [1996] 40 NSWLR 543 (refd)
Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd & Ors [1991] 2 MLJ 258 (refd)
Morice v Lee (1725) 8 Mod 262 (refd)
N Joachimson (A Firm Name) v Swiss Bank Corporation [1921] 3 KB 110 (refd)
Ng Seng Hwa v CI Holdings Bhd [1994] 1 MLJ 343 (refd)
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 (refd)
Read v Brown [1888] 22 QB 128 (refd)
Thoday v Thoday [1964] P 181 (refd)
Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd (1992) 36 FCR 406 (refd)
Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713 (refd)
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (folld)

Legislation referred to

Bills of Exchange Act 1882 [UK]
Bills of Exchange Act 1949 ss 49(f), 70, 82, 83, 84, 85, 101(2)
Cheques Act 1957 (UK) ss 1, 2, 3, 4
Civil Law Act 1956 s 11
Limitation Act 1953 ss 6(1)(a), 22(1)(b)
Rules of the High Court 1980 O 18, O 18 r 19(1), O 18 r 19(1)(a), O 18 r 19(1)(b), O 18 r 19(1)(c), O 18 r 19(1)(d)

Prasad Abraham (Prasad Abraham) for the plaintiff.
K Anantham (Wong Chee Lin with him) (Skrine) for the defendant.

Abdul Malik Ishak J (now JCA):

INTRODUCTION

[1] The plaintiff appealed to the judge in chambers against the decision of the learned senior assistant registrar who struck out the plaintiff's claim. That appeal can be seen in encl 149.

THE SALIENT FACTS

[2] The plaintiff was the sole proprietor of a company known as the 'West Malaysia Frozen Food Company' and that company was engaged in the business of exporting frozen seafood. At all material times, the plaintiff was a customer of the defendant — Hock Hua Bank Berhad ('the bank').

[3] In 1974, the plaintiff sold and shipped consignments of frozen prawns to one Mathew (since deceased) in England. 13 invoices were raised by the plaintiff. The plaintiff had drawn up 13 bills of exchange against the said Mathew requiring him to pay to the order of the bank as the plaintiff's bankers the amount of the said bills which had a face value of RM1,005,700.22 after conversion from Sterling into Malaysian Ringgit.

[4] The 13 bills of exchange were given to the bank by the plaintiff for collection. The bank credited the plaintiff's account with the face value of the bills and forwarded the said bills to its correspondent bank in England for collection.

[5] It was not in dispute that in respect of two of the bills of exchange which were originally marked as 'At sight D/P (Documents against Payment)', the plaintiff had given the bank instructions to let the drawee (Mathew) to take delivery of the prawns against the trust receipts and related letters of undertaking instead of against payment.

[6] It was also not in dispute that all the other 11 bills of exchange were accepted by Mathew who subsequently failed to honour the said bills by making the necessary payments thereto. The bank accordingly debited the plaintiff's account with the amounts previously debited together with some other bank charges incurred by the bank.

[7] The bank debited the plaintiff's account with a total sum of RM1,083,171.56 on various occasions from 20 August 1974 to 31 October 1975. As a result of this debiting, the plaintiff's account was overdrawn and

A the bank requested for security to be provided by the plaintiff. The plaintiff then procured two charges to be executed in favour of the bank in respect of two pieces of properties owned by the plaintiff's wife.

B **[8]** In 1980, the plaintiff commenced Suit No C 1073 of 1980 in the Kuala Lumpur High Court against the bank for moneys had and received alleging that the bank had acted wrongfully and illegally in debiting his account with the sum of RM1,083,171.56 in 1974 and in 1975. Shortly put, the plaintiff's contention in that suit was that the bank had unconditionally purchased the 13 bills of exchange and the amounts credited by the bank into the plaintiff's C account were the purchase price of the said bills of exchange and that there can be no question of any reimbursement when the bills of exchange were subsequently dishonoured by Mathew. The bank, on the other hand, contended that the moneys credited into the plaintiff's account were advances made by the bank which were refundable and payable by the plaintiff in the D event the drawee (Mathew) did not honour the 13 bills of exchange.

[9] The bank in turn sued the plaintiff vide Suit No C 1279 of 1985 in the Kuala Lumpur High Court for moneys due and owing by the plaintiff to the E bank in respect of banking facilities granted by the bank to the plaintiff.

[10] The two actions — one by the plaintiff and the other by the defendant, were consolidated and heard on various dates over a period of some two years by VC George J (later JCA). F

[11] His Lordship VC George J (later JCA) delivered his judgment on 26 May 1994 and a copy of that judgment was exhibited as an exhibit to Ko Wan Khion's affidavit that was affirmed on behalf of the bank on G 21 November 1997 (see exh KWK–4 annexed as an exhibit to encl 7). In his judgment, the learned judge made, inter alia, the following findings (to paraphrase His Lordship's speech):

(a) That the bank had not purchased the 13 bills of exchange but had merely given the plaintiff a credit facility on the said bills. Thus, when H Mathew dishonoured the said bills by failing to make payment thereon, the bank was entitled to debit the plaintiff's account with the moneys previously advanced by the bank.

(b) That after Mathew had failed to make payment on the 13 bills of I exchange and/or for the shipment of the frozen prawns, the plaintiff as well as his brother had both gone over to England and there had negotiated a settlement agreement with the said Mathew pursuant to which the learned judge found as a fact that the plaintiff had taken back substantially all the prawns in question, and a portion of which he had

then re-sold to the Chan Brothers of London and the sale proceeds of which had been credited into his bank account.

(c) That the plaintiff did not purport to claim against the bank for alleged negligence as a collecting bank or agent.

(d) That the evidence in the case, oral and documentary, was overwhelmingly against the contentions made by the plaintiff and against the submissions made on his behalf. Accordingly, the plaintiff's action against the bank was dismissed with costs.

[12] His Lordship VC George J (later JCA) gave judgment in favour of the bank in respect of the bank's action against the plaintiff and he also ordered that the bank was at liberty to proceed with the foreclosure proceedings commenced in respect of the two charges, which had been stayed pending the decision in the consolidated actions.

[13] The plaintiff appealed against the consolidated judgment and his appeal was dismissed with costs by the Federal Court on 14 February 1996. That was certainly a long time ago.

[14] Again, in 1996, the plaintiff commenced Originating Summons No D2–24–67 of 1996 in the Kuala Lumpur High Court against the bank for the delivery up and return of the 13 bills of exchange. The originating summons was heard and dismissed with costs on 3 October 1996 by Abdul Aziz bin Mohamad J (now FCJ) who held, inter alia, that he was not satisfied that the said bills were with the bank or with any of its agents. It must be borne in mind, as at 1996, more than 22 years had passed since the 13 bills of exchange were dishonoured by Mathew in 1974 and in 1975. The grounds of judgment of Abdul Aziz bin Mohamad J (now FCJ) can be seen at exh KWK–6 to encl 7.

[15] After the dismissal of the originating summons by Abdul Aziz bin Mohamad J (now FCJ), the plaintiff proceeded to file the present action against the bank on 1 October 1997. In his statement of claim, the plaintiff alleged, inter alia, that since it was decided in the consolidated judgment by VC George J (later JCA) and later by the Federal Court, who had dismissed his appeal, that the bank had not purchased the 13 bills of exchange the plaintiff averred that he, as the owner of the said bills, were entitled to their return. The plaintiff sued the bank for the delivery of the 13 dishonoured bills of exchange (although in reality there should only have been 11), alternatively, for their equivalent face value together with interest thereto at 18% per annum on monthly rests commencing from the respective dates of debiting by the bank of his account in 1974 and in 1975. The plaintiff also prayed for an indemnity and an order that the bank be restrained from

enforcing the consolidated judgment, special damages, general damages, exemplary damages and aggravated damages.

[16] In the present action, after the writ and the statement of claim were served, the bank entered an appearance and promptly filed the summons in chambers herein on 22 November 1997 to strike out the plaintiff's writ and the statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 ('RHC') and the inherent jurisdiction of the court as reflected in encl 6.

[17] Pending the hearing of the O 18 application, the bank did not file its defence.

[18] The plaintiff through his solicitors gave notice to the bank to file its defence. The bank promptly filed an application to this court for deferment of the time for filing its defence in view of the striking out application.

[19] The plaintiff entered judgment in default of defence against the bank on 9 December 1997 for the sum of RM1,083,171.56 together with interest at the rate of 18% per annum at monthly rests on the sums and from the dates more particularly stated therein. On 19 November 2002, the plaintiff had consented to the setting aside of the default judgment with costs in the cause. Again, on 19 November 2002, Public Bank Bhd has been substituted as the defendant in place of Hock Hua Bank Bhd by virtue of the merger exercise between the two banks. It must be borne in mind that the plaintiff had consented that the filing of the defence by the bank may be deferred until the disposal of the bank's application to strike out the plaintiff's claim. The learned senior assistant registrar struck out the plaintiff's claim at the hearing of encls 6 and 149 was the appeal filed by the plaintiff to the judge in chambers.

[20] It was submitted by the bank that the statement of claim ought to be struck out because it constituted an abuse of the process of the court. It was also submitted that the plaintiff had no conceivable cause of action against the bank and that the plaintiff's action was time barred.

WHAT ARE BILLS OF EXCHANGE?

[21] They are instruments by means of which a series of debts may be discharged without the use of cash. They have been described as payment postponed by the granting of credit. They are used for transactions conducted domestically and in international trade.

[22] A cheque, for instance, can be said to be a special form of a bill of exchange which is drawn on a banker payable on demand and is normally intended for the immediate discharge of a single debt. Whereas a promissory note is a continuing security for a debt. Both bills of exchange and cheques are orders to pay. Promissory notes, on the other hand, are promises to pay.

[23] Thus, bills of exchange, cheques and promissory notes are forms of negotiable instruments that has acquired some measure of popular usage. Over the years, new instruments appear at the scene and they too possess the characteristics of negotiable instruments. Three common characteristics are found in negotiable instruments be they bills of exchange, cheques or other forms of negotiable securities:

(a) that the instrument is freely transferable;

(b) that the transferee of a negotiable instrument is entitled to sue on the instrument, as a matter of course, in his own name; and

(c) that if the instrument comes into the hand of a bona fide transferee for value, then the transferee is said to have a better title than that of the transferor.

[24] The English law constitutes part of the common law. In England, the law concerning bills of exchange, cheques and promissory notes has been codified and it is now embodied in the Bills of Exchange Act 1882. Our Malaysian Bills of Exchange Act 1949 is in pari materia with the English Bills of Exchange Act 1882. Even the English Cheques Act 1957 are incorporated into our Malaysian Bills of Exchange Act 1949. A good example would be this. That ss 1 to 4 of the English Cheques Act 1957 are to be found in ss 82 to 85 of the Malaysian Bills of Exchange Act 1949. Section 101(2) of the Malaysian Bills of Exchange Act 1949 preserves the continued applicability of the English common law. It must be borne in mind that the English mercantile law constitutes part and parcel of the English common law and that too has been preserved in our Malaysian Bills of Exchange Act 1949.

[25] No precise form of words is essential to the validity of a bill of exchange. Thus, the order to pay need not be in any particular form. Any expression amounting to an order (*Morice v Lee* (1725) 8 Mod 262) or direction is sufficient. It is not necessary to use the word '*pay*' because any synonymous or equivalent expression like '*credit in cash*' would suffice. In *Ellison v Collingridge* (1850) 9 CB 570, the phrase, '*I promise to pay or cause to be paid*' is said to be a good note. It is said to be an alternative expression importing the same thing (*Lovell v Hill* (1833) 6 C & P 238). The person who gives the order to pay and who signs the bill of exchange is called the '*drawer*' while the person to whom the bill of exchange is addressed is called

the '*drawee*'. The person named in the instrument to whom or to whose order the payment is made to is known as the '*payee*'.

[26] So much for the legal semantics.

THE PRIMARY ISSUES

[27] The bank relied primarily on two main grounds. Firstly, the doctrine of res judicata or issue estoppel in the wider sense. Secondly, the question of limitation. I will now examine these issues based on the authorities and the facts of the present appeal.

RES JUDICATA OR ISSUE ESTOPPEL

[28] The law books are replete with authorities on this issue. Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, PC, delivering the judgment of the Privy Council, had this to say in regard to the doctrine of res judicata at pp 590–591 of the report:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of res judicata is the judgment of Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100, at p 115, where the judge says:
>
> > … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> The shutting out of a 'subject of litigation' — a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in No 969 came to be answered Mr Lai was unaware, and could not reasonably have been expected to be aware, of the

circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.

The Vice-Chancellor's phrase 'every point which properly belonged to the subject of litigation' was expanded in *Greenhalgh v Mallard* [1947] 2 All ER 255, at p 257, by Somervell LJ:

> … res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

Again, a phrase used by Lord Shaw of Dunfermline in delivering the opinion of the Board in *Hoystead v Commissioner of Taxation* [1926] AC 155, at p 171, 'the present point was one which, if taken, went to the root of the matter on the prior occasion', appears precisely apposite to the failure, in answer to the counterclaim in No 969, to raise the matters founded on in No 534 which, if then substantiated, would have been then decisive. An instance of a hard case in which the rule was applied is *In re Koenigsberg* [1948] Ch 727.

Their Lordships are, accordingly, of opinion that the Full Court was right in ordering that the statement of claim in No 534 be struck out as an abuse of the process of the court; they will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

[29] In *Greenhalgh v Mallard* [1947] 2 All ER 255, the Court of Appeal held (see the headnotes at pp 255–256 of the report):

> Any series of concerted acts damaging to a plaintiff can give rise to only one cause of action for conspiracy. The unlawfulness resides in the fact of combination. A plaintiff who believes he has a cause of action in conspiracy must, therefore, decide whether he is going to say either (i) that the purpose was unlawful but not that the means were unlawful, or (ii) that the means were unlawful but not that the purpose was unlawful, or, that both purpose and means were unlawful. If he has chosen to put his case in one of the first two ways, he cannot, thereafter, bring the same transactions before the court, put his case in the other way, and say he is relying on a new cause of action. In such circumstances he can be met with a plea of res judicata, or the statement of claim may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the court.

[30] Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, delivering the judgment of the then Supreme Court held as follows (see p 190 of the headnotes):

(1) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to

litigate once more the res judicata, as the judgment becomes the truth between such parties. An *estoppel per rem judicatum* has been created as a result.

(2) There are two kinds of *estoppel per rem judicatum*, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

(3) Unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata, which is an estoppel based on public policy, even if it has not been pleaded as public policy requires that there should be finality in litigation.

(4) The borrower's case was a classical case for the application of the doctrine of res judicata by way of a cause of action estoppel. The causes of action of both the first proceeding and the present statement of claim were indentical, as both claimed damages for failure of the finance company to allow the borrower to utilize in full the loan of RM750,000, causing loss consequent upon the failure of the housing development to be proceeded with further. All rights and liabilities of both parties had merged into the judgment of the first proceeding and the effect of a cause of action estoppel was absolute.

[31] In *Ng Seng Hwa v CI Holdings Bhd* [1994] 1 MLJ 343, Shaik Daud J (later JCA) in striking out the plaintiff's writ and the statement of claim held that (see p 343 of the headnotes):

(1) It was clear that the parties were the same in both actions, and both actions were grounded on the same issue, ie whether the option had lapsed. Therefore, the subject matter was the same. The court had, in the former action, made a final decision on this and, on the doctrine of res judicata, the plaintiff was completely barred from agitating the matter again. His remedy was simply to appeal against the former decision. This he failed to do. Therefore, he was barred from instituting this suit based on the same cause of action.

(2) Even though the so-called new issue was not to be found in the plaintiff's statement of claim in the former action, nevertheless the plaintiff did raise this issue in a disguised manner in the striking out

proceedings. In any event, the so-called new issue could and should have been raised in an earlier action. Matters which could have been raised in an earlier action should have been raised then and this is the doctrine of res judicata in its wider sense. On the facts of this case, both the narrow and wider sense of the doctrine of res judicata applied and the plaintiff was completely barred from instituting the present action based on the same cause of action and same reliefs being sought.

[32] In *Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd & Ors* [1991] 2 MLJ 258, Richard Talalla JC (as he then was) aptly said at p 260 of the report:

> It has been stated in the Supreme Court that even where res judicata is not strictly established or where *estoppel per rem judicatum* has not been sufficiently pleaded or made out but nevertheless the circumstances are such as to render any reagitation of the question formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action. See the judgment of Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494, wherein His Lordship considered that it would suffice in that regard to refer to the judgment of the Privy Council delivered by *Lord Wilberforce in Brisbane City Council and Myer Shopping Centres Pty Ltd v A-G for Queensland* [1979] AC 411.

[33] Abdul Malek Ahmad J (later President of the Court of Appeal) in *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713, vigorously applied the Privy Council's case of *Yat Tung* and His Lordship held as follows (see the headnotes at p 714 of the report):

(2) For res judicata to apply, the parties need not be the same and there had to be privity of interest between the defendants in both actions by the plaintiff. As it was not disputed that the second defendant was the registrar and agent of the first defendant, the liability of first and second defendants were merged. After making the option to leave the first defendant out of the 1988 action, the plaintiff was estopped from dragging the first defendant in for relief similar to that which he had obtained in the 1988 action. As a result, having sued the agent, the plaintiff was not in a position to sue the principal for the same transaction.

(3) Although the prayers in this action may appear different by the ancillary claim for bonus shares, rights issue shares and dividends, the relief claimed was substantially the same as the relief obtained in the 1988 action. The plaintiff could not now be allowed to ask for ancillary prayers that he had left out in the 1988 action. As the relevant relief had already been obtained, the writ and statement of claim disclosed no

reasonable cause of action, was scandalous, frivolous and vexatious, and a blatant abuse of the process of the court.

[34] The facts of *Yat Tung* are quite relevant in adjudicating encl 149 and I shall now reproduce them by referring to the headnotes at p 581 of the report:

> The owners of a property borrowed money from the first respondent (the bank) which loan was charged upon the property. The owners defaulted on payment of the loan interest due to the bank and absconded. The bank, in exercise of its rights, sold the property to the appellant. The bank assigned the property, pursuant to the sale, to the appellant and the appellant borrowed money from the bank on the security of a mortgage of the property. The appellant defaulted on the payment of interest under the mortgage and the bank exercised its right of sale thereunder and sold the property to the second respondent. The appellant brought an action against the bank (No 969 of 1969) claiming that the sale of the property to it was a sham; that the property had been conveyed to it as trustee for the bank and the mortgage was accordingly a nullity. The bank denied that the sale was a sham and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The court dismissed the appellant's claim and upheld the bank's counterclaim. One month after that judgment the appellant brought an action against the bank and the second respondent (No 534 of 1972) claiming that the sale by the bank to the second respondent was void or voidable as fraudulent in that the bank and the second respondent 'were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain the … property at a low price and to extinguish the plaintiff's interest therein'. The bank and the second respondent applied by summons for an order that the statement of claim be struck out as (inter alia) being vexatious, frivolous and/or otherwise an abuse of the process of the court. The judge held that the allegation of fraud and the voidability of the sale by the bank to the second respondent were matters which were available for litigation in action No 969, and ordered that the statement of claim be struck out. The order striking out the statement of claim was affirmed by the Full Court.

Continuing on the same page and spilling over to p 582 of the report, the headnotes state:

> On appeal to the Judicial Committee:
>
> Held, dismissing the appeal, that there was no reason why a defence impugning the bona fides of the sale by the bank to the second respondent could not have been pleaded as a counterclaim to the counterclaim in action No 969; that accordingly, the doctrine of res judicata in its wider sense applied and it would be an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings.

[35] Now, it should be noted that in Yat Tung's first action against the bank (No 969), Yat Tung had claimed that the sale of the property by the bank to

it was a sham and the mortgage a nullity. The bank denied that the sale was a sham and counterclaimed for loss suffered on the re-sale of the property to Choi Kee. The Privy Council stated that the real substance of the appeal before it was as follows (see p 588 of the report):

> Having said so much by way of explanatory introduction, it becomes possible to go straight to the clear and valuable statement made by McMullin J in the Full Court of the real substance of the present appeal.
>
> > The real issue to be decided is whether it be true to say that the allegation of fraud and the voidability of the sale to Choi Kee were matters available for litigation in 969 and that Mr Lai chose not to rely on them and whether they are to be regarded as res judicata in the sense that they ought to have been so litigated.
>
> There arise there from two questions: (a) whether there was any procedure by which, in No 969, Yat Tung could have pleaded as a reply to the bank's counterclaim what was to be the basis of their own claim in No 534, and (b) if there was, what consequences flow from their failure to have done so.

[36] It was rightly submitted that *Yat Tung* was on all fours with the present appeal. In the *Yat Tung*'s case, Yat Tung had brought suit No 969 against the bank on the basis that the mortgage was a sham and a nullity. The bank counterclaimed against Yat Tung on the basis that the mortgage was valid. After Yat Tung lost its case against the bank and after the bank succeeded in its counterclaim, Yat Tung commenced Suit No 534 and in its statement of claim in Suit No 534 Yat Tung pleaded that in *accepting the decision in suit No 969 as correct* (that is, that the mortgage was valid), Yat Tung claimed against the bank on the basis that the bank had acted in concert with Choi Kee with a common design calculated to obtain the said property at a low price and to extinguish the plaintiff's interest therein. The Privy Council held that the issues raised by Yat Tung in Suit No 534 could and should have been raised in Suit No 969 and Yat Tung was therefore precluded from bringing Suit No 534 by the doctrine of res judicata in a wider sense.

[37] Applying the principles enunciated in *Yat Tung* to the facts of the present appeal, the real issue to be determined may be formulated in this way:

> Whether it be true to say that any claim by the plaintiff for the return of the originals of the dishonoured bills of exchange was a matter available for litigation in the consolidated suit and that the plaintiff chose not to raise the matter and whether the matter was to be regarded as res judicata in the sense that it ought to have been litigated in the consolidated suit?

[38] Flowing from that, the following two questions would be relevant to the occasion at hand:

(a) Whether there was any procedure by which, in the consolidated suit, the plaintiff could have pleaded that in the event the bank succeeds in its contention that it had not unconditionally purchased the bills in question, then the plaintiff could have claimed for the return of the dishonoured bills?

(b) If there was, what consequences flow from the plaintiff's failure to do so?

[39] The answer to the first question must be in the affirmative. The plaintiff could have pleaded his present claim against the bank as an alternative claim against the bank in the consolidated suit by either amending his statement of claim against the bank or by counterclaiming against the bank in the bank' s claim against him in the consolidated suit.

[40] In answering the second question, I have this to say. That the plaintiff must be estopped by the principle of res judicata from bringing the present action herein.

[41] In the consolidated suit that was heard by VC George J (later JCA), the following issues were ventilated before His Lordship:

> Whether the bank had unconditionally purchased the bills in question without recourse to the plaintiff, in which event the bank should have had no right to debit the plaintiff's account when the bills were subsequently dishonoured; or whether the bank had merely granted the plaintiff a facility and was acting as collecting agent in respect of the bills in which event (if not for the settlement agreement between the plaintiff and Mathew) the bank would have the right to debit the plaintiff's account when the bills were dishonoured upon returning the dishonoured bills to the plaintiff for his further action.

[42] It cannot be denied that the plaintiff's present claim against the bank for the return of the originals of the dishonoured bills was so inextricably linked to the bank's right to debit his account after the bills were dishonoured and it was also clearly part of the subject matter of the litigation in the consolidated suit thereby giving rise to only one conclusion and that would be that the plaintiff's claim must be barred by the doctrine of res judicata.

[43] It must be recalled that the learned judge in the consolidated suit had found as a fact that after Mathew had dishonoured the bills of exchange, the plaintiff and his brother had personally gone to England and there reached a

settlement agreement with Mathew pursuant to which the plaintiff had taken back substantially all the prawns sold to Mathew.

[44] The direct effect of the decision of the learned judge in the consolidated suit may be stated as follows:

(a) that the plaintiff could have no cause of action whatsoever against Mathew on the dishonoured bills;

(b) that the plaintiff could have no legal entitlement to possession of the dishonoured bills as they should have been surrendered to Mathew for cancellation and probably were; and

(c) that the dishonoured bills of exchange would have become mere worthless pieces of paper as a consequence of the settlement between the plaintiff and Mathew.

[45] At para 5.1.2.21 of the plaintiff's affidavit in reply in encl 9 that was affirmed on 5 December 1997, the plaintiff challenged the applicability of the principle of res judicata and it was framed in this way:

> Even if the principle of res judicata applies in respect of the decision of the consolidated suit, which I have been advised by my solicitors and which I verily believe it does not, I humbly urge this honourable court to disregard it due to the special circumstances of this case namely that the findings made were merely obiter dictum and in any event, erroneous and goes against the weight of evidence given and causes severe and unjust hardship on me.

[46] The plaintiff, with respect, cannot blow hot and cold. His present action was brought on the basis that the decision of the learned judge in the consolidated suit (to the effect that the bank had not purchased the bills of exchange unconditionally) was correct. So, the plaintiff cannot, on the one hand, say that the decision of the learned judge in the consolidated suit was wrong, and, at the same time, filed this action on the basis that, that decision was correct. If the plaintiff is now alleging that the doctrine of res judicata should not apply and the decision of the learned judge in the consolidated suit was wrong, then he should not have commenced this action. He should instead commence an action claiming that the bank had purchased the bills of exchange unconditionally and attempt (if he can) to re-litigate the identical issues litigated with finality in the consolidated suit. Any criticism by the plaintiff of the correctness or the binding effect of the consolidated judgment is out of place and should be disregarded.

[47] Even if the plaintiff was not precluded by the judgment of VC George J (later JCA) in the consolidated suit from bringing this action, the

plaintiff would in any event have been precluded by the decision of Abdul Aziz bin Mohamad J (now FCJ) in the subsequent originating summons from bringing the present action.

[48] One may pose this question: what was the basis of the plaintiff's claim against the bank in the originating summons that was heard by Abdul Aziz bin Mohamad J (now FCJ)? The basis of the plaintiff's claim in the originating summons which was dismissed with costs was that, as was held by Abdul Aziz bin Mohamad J (now FCJ) that the bank had not unconditionally purchased the 11 bills of exchange, the plaintiff was entitled to the return of the dishonoured bills of exchange.

[49] Another question to pose would be this: what is the basis of the plaintiff's present action? The answer would be this: that it is clearly identical to that in the originating summons.

[50] Could the plaintiff have claimed in the originating summons for his alleged loss as a result of the bank not returning to him the dishonoured bills of exchange? Without a doubt he could have. As a matter of fact, Abdul Aziz bin Mohamad J (now FCJ) aptly said in his judgment (see pp 217 to 218 of Ko's affidavit dated 21 November 1997 as reflected in encl 7):

> Learned counsel for the plaintiff had explained in his submission that the importance to the plaintiff of the order sought was as confirmation of the plaintiff's right to the documents sought. Should the respondents fail to deliver the documents, the plaintiff intended to sue them for their value. I was of the view that if that was the plaintiff's intention, then he should straightaway have commenced an action against the respondents for the return of the documents with an alternative prayer for compensation or damages, instead of proceeding, as they had done, to apply for a peremptory order of delivery, which, if given, would be enforced through contempt proceedings and which therefore ought not to be given unless it was clearly established that it was within the respondents' capacity to deliver the documents.

[51] Now, the plaintiff having claimed for the return of the dishonoured bills of exchange in the originating summons could not do so again in the present action. The plaintiff would also be barred from claiming for any other ancillary or alternative reliefs or prayers which he could and should have claimed in the originating summons but did not (*Wong Peng Yan Benjamin v Genting Bhd & Anor*).

[52] The case of *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502; (1988) 78 ALR 271 is quite illustrative of the principle of res judicata. There, the deputy commissioner issued a writ in the Supreme Court of the Australian Capital Territory to recover some $25,000 in unpaid

income tax, naming Chamberlain as the defendant. Chamberlain owed the deputy commissioner ten times the amount claimed in the writ. He consented to judgment and paid the judgment debt. Four days later, the deputy commissioner issued a second writ claiming the balance of the debt. The High Court unanimously held that the deputy commissioner's cause of action had merged in the earlier judgment, raising a res judicata which estopped him from vexing Chamberlain with another suit on the same cause of action. The causes of action in both proceedings were the same: the deputy commissioner sued on a debt established by the same income tax assessments and the same penalties for late payment.

[53] The entry of judgment on an action extinguishes the right to maintain proceedings based on the same cause of action (*Jackson v Goldsmith* (1950) 81 CLR 446 at p 466 per Fullagar J (dissenting); and *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at p 597 per Gibbs CJ, Mason and Aickin JJ). If established, the cause of action is said to 'merge' in the judgment. It no longer has any independent existence. If rejected, the parties are estopped from claiming that the cause of action exists (*Thoday v Thoday* [1964] P 181 at pp 197–198 per Diplock LJ; *Blair v Curran* (1939) 62 CLR 464 at p 532 per Dixon J; *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at p 409 per Gummow J (affirmed by the Full Federal Court in *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (receivers and managers appointed) (in liquidation)* (1993) 43 FCR 510; 115 ALR 377); and *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* [1996] 40 NSWLR 543 at pp 556–558 per Clarke JA (Priestly JA concurring)).

[54] The term 'issue estoppel' was coined by Higgins J in his dissenting judgment in *Hoystead v Federal Commissioner of Taxation* (1921) 29 CLR 537 at p 561 but its existence can be traced back to the *Duchess of Kingston's case* [1776] 21 Smith LC (13th Ed) 644 at p 645. Dixon J in *Blair v Curran* (1939) 62 CLR 464 at pp 531–532 succinctly explained the term 'issue estoppel' in this way:

> A judicial determination directly involving an issue of fact or law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion. Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.

[55] 'Issue estoppel' is another form of res judicata. A res judicata is a final judicial decision pronounced by a judicial tribunal which disposes of the matter, once and for all. The doctrine of res judicata rests on two broad

principles. Firstly, it is a general rule of public policy that there should be finality in litigation. Secondly, an individual should not be vexed twice for the same cause.

[56] Now, there can be no doubt that the judgment of Abdul Aziz bin Mohamad J (now FCJ) can operate as an estoppel or res judicata notwithstanding that the proceedings in question were in the form of an originating summons and was not a writ action. It was the plaintiff himself who elected to proceed by way of an originating summons and the originating summons was not struck out on a technicality or on the basis that the plaintiff should have filed a writ instead. The originating summons was heard on its merits and the plaintiff could have applied to cross-examine any deponent on behalf of the bank if he had wished to.

[57] It must be emphasised that the plaintiff in this case had chosen, with the benefit of legal advice at all times, to put his case against the bank in the consolidated suit before VC George J (later JCA) in only one way, namely, that the bank had purchased the bills of exchange without recourse when he could easily have pleaded in the alternative for the return of the dishonoured bills of exchange if he had wanted to. He cannot thereafter, after he has failed in his case, go back and bring the same transaction before the court and put his case the other way round, namely, that the bank had not purchased the bills of exchange, and say that he is relying on a new cause of action. The plea of res judicata would definitely be invoked against the plaintiff.

[58] I will now apply the following latin phrase vigorously for the benefit of the bank. *Res judicata pro veritatem accipitur*. It means this. The need for decisions of the court, unless set aside or quashed, to be accepted as incontrovertibly correct.

[59] The facts of the present appeal fall squarely within the ambit of the doctrine of issue estoppel as applied by the Privy Council in the case of *Yat Tung*. There is no room for the plaintiff to aver that he can come within the narrow scope of 'special circumstances' so as to avoid the applicability of the doctrine of issue estoppel to his present claim.

LIMITATION

[60] An action based on a dishonoured bill of exchange is an action founded on contract. Section 6(1)(a) of the Limitation Act 1953 provides that actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[61] The plaintiff's account was debited, upon the dishonour of the bills of exchange in 1974/1975. The limitation period for any suit against Mathew on the dishonoured bills would have expired at the latest in 1981. Accordingly, there is no basis whatsoever for the plaintiff to now allege that, due to something that was said by the bank's counsel at the trial of the consolidated suit on 18 February 1992, the plaintiff was lulled into thinking that the bank would sue Mathew and therefore there was no necessity for the plaintiff to claim for the return of the originals of the bills of exchange in the consolidated suit. In 1992, any action on the dishonoured bills of exchange had long been time barred. There is no way that the plaintiff could be led into thinking that the bank would be suing Mathew (since the plaintiff is discharged on the bills by virtue of the non-protesting and noting by the bank) on the dishonoured bills of exchange by something the bank's counsel said in 1992 when the limitation period for any such action by the bank would have been time barred for more than 11 years at the time such submission by the bank's counsel in the consolidated suit was made.

[62] The plaintiff's submission to the effect that he had been comforted into thinking that the bank would sue Mathew because of the submission of its counsel and that was why the plaintiff did not amend his claim in the consolidated suit to include a prayer for the return of the originals of the bills of exchange consist of issues of fact which the plaintiff had not in any way averred in any of the affidavits filed by him in relation to the bank's application in encl 6. Consequently, I must disregard the whole of the plaintiff's submission on this point.

[63] The plaintiff is deemed to have conceded that his alleged cause of action against the bank accrued in 1974/1975. The plaintiff has prayed in his statement of claim for and entered default judgment against the bank with interest from various dates in 1974 and 1975 pursuant to s 11 of the Civil Law Act 1956. The mere fact that the plaintiff had prayed for interest from 1974/1975 and had previously entered default judgment with interest from 1974/1975 was a concession by him that his alleged cause of action arose in 1974/1975.

[64] Brett J in *Jay Cooke & Ors v Henry S Gill & Anor, The Union Bank of London, Garnishees* (1873) LR 8 CP 107, at p 116, defined a 'cause of action' to mean 'every fact which is material to be proved to entitle the plaintiff to succeed — every fact which the defendant would have a right to traverse'. This definition was approved by the English Court of Appeal in the case of *Read v Brown* [1888] 22 QB 128 and it was also followed by our Supreme Court in the case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409.

[65] The Supreme Court in *Credit Corporation (M) Bhd v Fong Tak Sin*, speaking through Hashim Yeop A Sani CJ (Malaya) (as he then was), had this to say at p 411 of the report:

> From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

Continuing at p 413 of the report, His Lordship Hashim Yeop A Sani CJ (Malaya) (as he then was) had this to say:

> As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case on 18 June 1979 there was undoubtedly in existence someone who can sue, that is, the respondent. There was also undoubtedly some person in existence who can be sued, amongst them the appellant. On the same date there was also in existence the facts to be proved by the respondent to entitle the plaintiff to succeed in the action.

On the question of limitation, His Lordship Hashim Yeop A Sani CJ (Malaya) (as he then was) reminded us of its importance in this way (see pp 413–414 of the report):

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
>
> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[66] Now, in the present appeal before me, as at 1974/1975 there was undoubtedly someone who could sue for the return of the dishonoured bills of exchange and that would be the plaintiff. There was also someone who could be sued and that would be the defendant. Furthermore, all the facts to be proved which would entitle the plaintiff to succeed were already in existence then.

[67] The plaintiff had handed the bills of exchange to the bank for collection and the bank had forwarded them to their correspondent bank in England, nominated by the plaintiff, for collection. The bills of exchange were accepted by Mathew but dishonoured upon the due dates for payment. The bank had debited the plaintiff's account with the moneys previously

credited together with the bank charges. The dishonoured bills of exchange were apparently not returned to the plaintiff. The bank had merely granted the plaintiff a facility and had not purchased the bills of exchange unconditionally.

[68] As demonstrated, all the material facts which are material to enable the plaintiff to put forward a claim that the bank could not have validly debited his account without returning to him the dishonoured bills of exchange existed in 1974/1975, whether known or unknown to the plaintiff, and, consequently, the plaintiff's cause of action if any for the return of the dishonoured bills of exchange would have accrued by then.

[69] The judgment of VC George J (later JCA) in the consolidated suit merely confirmed the bank's stand that it had never purchased the bills of exchange. The fact that the plaintiff persisted in maintaining that the bank had purchased the bills of exchange outright cannot postpone the running of the limitation period. The bank certainly never led the plaintiff to believe that it had purchased the bills without recourse. Accordingly, the plaintiff's contention that he could not have brought the present action against the bank in the consolidated suit was totally without basis.

[70] At the hearing before the learned senior assistant registrar in regard to encl 6, the plaintiff did not refer at all to the words '*constructive trust*'. At that stage, the plaintiff was trying to argue that his cause of action only accrued when the Federal Court dismissed his appeal on 14 February 1996 and therefore the action herein, commenced within six years of that date, is not time barred. Now, before me, the plaintiff has done a complete turnaround on the issue of limitation. The plaintiff argues that his case now comes within purview of s 22(1)(b) of the Limitation Act 1953 and therefore there is no time bar. I categorically say that s 22(1)(b) of the Limitation Act 1953 do not apply for the following reasons:

(a) The relationship between the plaintiff and the bank can be described as customer and banker and, in the present case, the bank was merely acting as the collecting agent on behalf of the plaintiff in respect of the collection of the bills of exchange in question. That much is clear from the judgment of VC George J (later JCA) in the consolidated suit. It is trite law that the relationship between the bank and its customer in relation to the current account and in the collection of the bills of exchange on behalf of a customer is in contract. If any authority is required for this trite statement of the law, reference should be made to the case of *N Joachimson (A Firm Name) v Swiss Bank Corporation* [1921] 3 KB 110 as well as to the case of *Edward Thomas Foley v Thomas Hill & Ors* (1848) 2 HL Cas 28. *Paget's Law of Banking*, (9th Ed) at p 82 carries the following write-ups:

The judgment of the Court of Appeal in *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110; 26 Com Cas 196, is still the basis for any consideration of the normal banker–customer relationship–that is, relationship arising from special contract. There are, however, many other aspects to be considered; the current account, despite the many mutual duties engrafted on the relation of banker and customer since 1884, the date of *Foley v Hill* (1848) 2 HL Cas 28, is still the basic and predominant element in dealings between the parties.

(b) Without citing any authority, the plaintiff now converts the relationship between himself and his banker into one of trust and says that the bank is holding onto the originals of the dishonoured bills of exchange as a constructive trustee and that his claim is not subject to limitation.

(c) It must be emphasised that, at all material times, the return of the bills of exchange to the drawer (ie the plaintiff) is only one of the modes of showing dishonour, nothing more and nothing less (see s 49(f) of the Bills of Exchange Act 1949). In this case, after reading the judgment of VC George J (later JCA), the plaintiff clearly had notice that the bills of exchange were dishonoured as the bank had debited his account and he had, together with his brother, went all the way to London to settle the issue with Mathew, with the consequence that, pursuant to a settlement agreement with Mathew, the learned High Court judge found, as a matter of fact, that save for 36 cartons, all of the prawns which were the subject matter of the sale contract between the plaintiff and Mathew had been released to the plaintiff.

(d) The bank has shown that pursuant to s 70 of the Bills of Exchange Act 1949 there was nothing to stop the plaintiff from bringing an action against Mathew on the dishonoured bills of exchange even if he did not have the originals of the dishonoured bills of exchange as he had copies of them at all times and they were tendered as exhibits at the trial of the consolidated suit before VC George J (later JCA). In Mathew's action against the plaintiff, Mathew had pleaded in para 8 of his statement of claim (see p 39 of Ko's affidavit affirmed on 2 January 1998) that the bills of exchange drawn on him by the plaintiff relating to the shipment of prawns were still outstanding. Mathew himself had admitted that he dishonoured the bills of exchange drawn on him and so, in his counterclaim, there was nothing to stop the plaintiff from suing Mathew on the dishonoured bills of exchange. But, instead of suing on the dishonoured bills of exchange, the plaintiff in his counterclaim sued only for pounds sterling 77,484.94 whilst admitting that the prawns he took back from Mathew were sold

for the sum of pounds sterling 141,272.78. It was in that context that VC George J (later JCA) in the consolidated suit said (see p 176 of the plaintiff's bundle of documents):

> The value of all the 16 invoices is £218,758. In his counterclaim in the Mathew's action the plaintiff sued for £77,485.94. It cannot be a coincidence that £218,758.72 less the £141,272.78 remitted by Chan Brothers amounts to £77,484.94. Inter alia, in the face of the contemporaneous documents and the pleadings drafted and filed some time later on behalf of the plaintiff in Mathew's action against him, I cannot but find as a fact almost beyond any reasonable doubt that the plaintiff and/or his brother as his agent had taken over initially 10,746 cartons of the prawns from Mathew and later another 1,164 cartons pursuant to a settlement arrived at with Mathew …

(e) Now, having sued the drawer who is the person liable on the dishonoured bills of exchange for the balance sum of £77,484.94 (and there is no evidence as to what had happened to that suit — the allegation in the plaintiff's submission that it was discontinued is another instance of the plaintiff giving evidence in his submission. Even if Mathew had discontinued his action against the plaintiff the latter still had his counterclaim against Mathew), and having obtained the benefit of all the sale proceeds of his consignment of prawns to Mathew and having sued the latter for the balance outstanding under his contract of sale to Mathew, the plaintiff is now suing the bank for the exact principal amount of RM1,083,171.56 which is the sum which the bank had debited his account with and obtained judgment for in the consolidated suit and which judgment sum has not yet been satisfied by the plaintiff, and arising out of that the question to pose is this: who is the one who is trying to have his cake and eat it, is it the bank or is it the plaintiff? The answer is quite obvious. It is the plaintiff.

(f) The originals of the bills of exchange are not 'security' as alleged by the plaintiff. They have no intrinsic value to constitute them as 'security'. The bills of exchange were not given to the bank as security. As contended by the plaintiff, they were purchased by the bank outright. And as held by the learned High Court judge in the consolidated suit, the bank was merely a collecting agent in respect of the bills of exchange. That being the case, the plaintiff is estopped by the doctrine of res judicata from re-litigating the decision of the learned High Court judge in the consolidated suit.

(g) The bank is not and was never a trustee in relation to the dishonoured bills of exchange. One does not hold pieces of paper as a trustee. The bank has never had title in the bills of exchange vested in them as held by the learned High Court judge in the

consolidated suit and the bank claims no interest in the dishonoured bills of exchange. Because of the judgment in the originating summons wherein the court held expressly that it found no evidence that the originals of the dishonoured bills of exchange were in the possession of the bank or its correspondent, the plaintiff is estopped by the doctrine of res judicata from saying that the documents are in the possession of the bank or its correspondent or that the documents are technically in the possession of the bank whatever that means.

THE DEFENCE HAS NOT BEEN FILED

[71] The plaintiff argued that where the bank relied on the defence of limitation, it has to be pleaded and that since no defence has been filed yet the plaintiff's claim cannot be struck out on the issue of limitation. One must not lose sight of the fact that the application in encl 6 was an application to strike out the plaintiff's claim under all the limbs of O 18 r 19(1) of the RHC and under the inherent jurisdiction of the court. Hence, the application herein is not only to strike out on the ground that no cause of action is disclosed but also on the grounds that the claim is scandalous, frivolous or vexatious and that it is an abuse of the process of the court.

[72] As demonstrated earlier, the plaintiff's claim was filed after the expiry of the limitation period and it ought to be struck out as prayed. And in my judgment, it was rather plain and obvious that the plaintiff's claim herein was not only frivolous and vexatious but also a classic case of an abuse of the process of the court. What the plaintiff is trying to do in this action is to overturn the decision of VC George J (later JCA) in the consolidated suit and that would certainly amount to an abuse of the process of this court.

CONCLUSION

[73] For the reasons adumbrated above, I dismissed the plaintiff's appeal in encl 149 with costs. I too ordered that the file should be closed forthwith.

Plaintiff's appeal dismissed with costs.

Reported by Brendan Navin Siva